UNITED STATES
v.
EVA M. POOL ET AL.

IBLA 82-39 Decided January 6, 1984

Appeal from the decision of Administrative Law Judge Robert W. Mesch declaring mining claims and millsite claim null and void. AZ 13970 through AZ 13973.

Affirmed in part, reversed in part.

1. Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

When the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which is sufficient to overcome the Government's showing on those issues raised.

Where the Government fails to present sufficient evidence to establish a prima facie case, the claimant need not present evidence in order to prevail. If a claimant, however, does present evidence, the determination of the validity of a claim must be made on the basis of the record as a whole, and not just a part of the record. A claimant need not affirmatively establish the existence of a discovery where there has been no prima facie case. The only risk that the claimant runs in such a situation is the risk that the evidence as a whole will establish by a preponderance of the evidence that an element of discovery is not present.

APPEARANCES: Stephen P. Shadle, Esq., Yuma, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Eva M. Pool and others 1/ have appealed from the decision of Administrative Law Judge Robert W. Mesch, dated September 1, 1981, declaring 10 lode mining claims and millsite claim null and void. 2/

This case involves consolidated contest proceedings, AZ 13970 through AZ 13973. On July 7, 25, and 29, 1980, the Bureau of Land Management (BLM), on behalf of the Army Corps of Engineers, filed contest complaints against appellants' mining and millsite claims. The claims at issue are within the Luke Air Force Gunnery and Bombing Range. They are also immediately adjacent to the patented La Fortuna mining claims which had been the site of a substantial gold discovery, around the turn of the century. The La Fortuna mine closed in 1904 when the main vein was lost at the Queen fault. No gold production has occurred from the La Fortuna since that time.

With respect to the lode mining claims involved herein, BLM charged, inter alia, that all of the subject mining claims were invalid because valuable mineral deposits had not been discovered as of August 24, 1962, or at the time of the hearing, and that the land within the claims was nonmineral in character. 3/ In addition, BLM contended that the claims were not marked or monumented on the ground so that their boundaries could be readily traced. With reference to the Pool millsite claim, BLM contended that it was invalid because (A) the land was not being used or occupied for mining or milling purposes in connection with the associated mining claims, and (B) the land did not contain a quartz mill or reduction works.

A hearing was held on March 30, 1981, at Yuma, Arizona. On September 1, 1981, Judge Mesch issued his decision holding all of the claims and the millsite to be invalid. Claimants have appealed to this Board.

Initially, prior to analyzing the testimony and evidence presented with respect to the individual claims, it is necessary to address a factual question which was the source of much confusion at the hearing, i.e., the situs of the claims on the ground. Since at least the early 1960's 4/ the property has been leased by the Department of Defense for use as a part of a

1/ The appellants are Eva M. Pool, Wilda Louise Myrick, Silvia Marjorie Pool, Ronald A. Pool, Phillip A. Emanuel, and Jean Emanuel.

2/ The claims are: Barbara, White Rock, and Beehive lode mining claims (AZ 13970); Arizona and Red Top lode mining claims (AZ 13971); Hillside, Little Gem, and Red Rock lode mining claims (AZ 13972); and Water Hole Nos. 1 and 2 lode mining claims and Pool millsite claim (AZ 13973).

3/ The contest also charged that the claims (with the exception of the Arizona and the Red Top claims) had not been properly recorded pursuant to section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976). No evidence was presented by the Government as to this allegation and this charge was dismissed by Judge Mesch at the hearing. See Tr. 121. The Government has not challenged this action before the Board.

4/ While the lease was signed in 1962, contestees' access to the claims was affected nearly a decade earlier. As Emanuel testified, in the early 1950's "one morning when we got up and went out to work on our mine, why, here was the airplanes over the top of us. * * * [W]e knew we had to get out of there, because, yes, they started the gunnery work and bombs" (Tr. 167).

bombing range. During this period of time, the monuments have been destroyed. Moreover, the actual location notices were tied to each other, rather than to a fixed landmark, so it is impossible to independently reestablish the claim locations at this time.

The Government introduced a map prepared by the Department of the Army showing the claims and upon which had been placed location of sample sites (Exh. E). This map, however, which served as the basis of reference for the Government's expert testimony, contradicted the recollection of Phillip H. Emanuel, a co-locator of a number of the claims who had actually worked the claims.

Emanuel had accompanied the Government mineral examiners in their sampling, and had indicated on which claims he thought values could be found. The conflict became obvious when the sample sites were placed on the Government map. Thus, samples which Emanuel thought should be on the Waterhole No. 2 claim were placed on the Hillside claim, samples from the Little Gem claim were placed on the Red Rock claim, and, in fact, the relative placement of the adjacent Waterhole Nos. 1 and 2 claims was reversed from what Emanuel thought it should be. One anomalous result was that while Emanuel told the examiners that there were no values on the Hillside claim, the Government map showed that the highest values occurring anyplace were on that claim.

In his decision, Judge Mesch noted that he accepted Emanuel's identification of the claims over the identification shown on the Corps of Engineers map (Decision at 6). We agree with this approach for a number of reasons. First of all, there was no real foundation laid as to how the Corps' map was developed. While the Government examiners utilized the map, they had no knowledge of who made it or on what basis the claim boundaries were delineated (Tr. 23). Second, the only person who possessed actual knowledge as to the claim boundaries was Emanuel, and on this question we believe his testimony should be accorded substantial weight.

Finally, we are mindful of the fact that the claims were apparently well monumented prior to the Government's acquisition of a leasehold interest (Tr. 147-48). The destruction of the monuments was, at a minimum, the result of Government neglect if not affirmative Governmental action in using the claims as part of a gunnery range. Having deprived the contestees of the only independent means to establish the claim corners since the location notices are inadequate for this purpose the Government should not now be allowed to challenge contestees' assertion of where the claims actually were.

In this regard, we view the Government's contention that the claims should be declared invalid because "the claims are not marked or monumented on the ground so that the boundaries can be readily traced" with incredulity. In the first place, as written, the allegation fails to state an adequate ground for the invalidation of a mining claim. While it is true that a lode claimant must monument claim corners in locating a claim (30 U.S.C. § 28 (1976)), the subsequent obliteration of these monuments does not invalidate the claim where the destruction is not caused by the claimants. See, e.g., Larned v. Dawson, 90 F. Supp. 14 (D. Alaska 1950). Absent an allegation that claimants were responsible for the present lack of monumentation or that the claims had never been monumented, the charge in the complaint was premised on a misperception of law.

We recognize that there could be situations where it is impossible to establish the exact situs of the claims from the location notices and thus the failure to maintain monuments might make it impossible to delineate the claims. Such, indeed, occurred in United States v. Independent Quick Silver Co., 72 I.D. 367 (1965), aff'd sub nom. Converse v. Udall, 262 F. Supp. 583 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1028 (1969). But, as a reading of that decision makes clear, the result in such a case is not invalidation of the claims. The holding of the Department was not that the disputed Bonanza claim was invalid for lack of monumentation, but rather that there was no discovery within that claim. Id. at 378-79. An inability to locate claim boundaries which results from failure to maintain monuments may make it more difficult for a claimant to establish that discoveries exist on specific claims, but it does not, by itself, necessarily invalidate the claim. See United States v. Christensen, A-27549 (May 14, 1958).

In any event, even if it could be argued that the failure to maintain monuments might work to invalidate claims in some circumstances, 5/ such a standard could scarcely be applied in the instant case where the Government was either the direct or indirect agent of the monuments' obliteration. We expressly reject this charge.

In his decision Judge Mesch bifurcated his examination of whether the Government had presented a prima facie case. Insofar as the Barbara and the Hillside claims were concerned, Judge Mesch noted that Emanuel had indicated to the Government mineral examiners that there was nothing worth sampling on the claims (Tr. 64). Judge Mesch found this sufficient to establish a prima facie case, noting:

> The sole function of a Government mineral examiner in examining a mining claim is to verify whether the mining claimant has, in fact, found a valuable mineral deposit. He has no obligation to explore or sample beyond those areas which have been exposed by the claimant and which, according to the claimant, constitute the discovery of a valuable mineral deposit. Hallenbeck v. Kleppe, [590 F.2d 852 (10th Cir. (1979)]; United States v. Porter, [37 IBLA 313 (1978)]. The recognition made by the contestees' representative that the two claims were not worthy of sampling constitutes a prima facie case in support of the allegations that the claims are invalid because they were not timely perfected and are not presently supported by the discovery of a valuable mineral deposit.

(Decision at 7-8). We agree.

5/ We do recognize that a lack of monumentation together with an inadequate description may render a location so indeterminate as to leave the ground open to subsequent location by another. See Flynn v. Velvelstad, 119 F. Supp. 93 (D. Alaska 1954). But, as noted in that decision, actual knowledge of the claims would be equivalent to valid record notice. Id. at 96. Given the facts of this case, such knowledge must clearly be imputed to the Government.

With respect to the other claims, however, Judge Mesch found that no prima facie case was presented by the Government. The reason for his finding lay in the unwillingness of the Government's mineral examiner, William Nelson, to express an expert opinion as to the existence of a discovery once he was apprised of the fact that, contrary to his instructions, the assay of the samples which he had taken was performed by atomic absorption rather than fire assay (Tr. 102-03, 122-28). Judge Mesch quoted the following exchanges from the transcript:

> JUDGE MESCH: Well, do you feel comfortable with the assay certificate that you received? Bear in mind, you're using that to base a professional opinion on as to the validity of these claims. Now in view of what has all developed, do you feel comfortable with that assay certificate in stating this professional opinion?
>
> THE WITNESS: No. Not as comfortable as I would be if I had the -- I don't believe that the -- I believe that the fire assay would be the way to have done these things. I couldn't -- I'm not as comfortable with these samples here, the results.
>
> JUDGE MESCH: Do you think that in view of what has developed that the proper thing to do would be to get a fire assay on the samples?
>
> A. Yes, at least spot check these against something that we've already sampled through here, yes.
>
> * * * * * * *
>
> JUDGE MESCH: * * * Do you feel, under the circumstances, that the claims ought to be reexamined and new samples taken, rather than base your professional opinion on this assay certificate?
>
> THE WITNESS: I think that would be a proper thing to do, but -- I can't refute that these samples may not be good samples. (Tr. 126, 127)

(Decision at 6-7). We agree with Judge Mesch that Nelson's disclaimers totally undermined his prior testimony as to a lack of discovery and rendered his expert opinion valueless in the instant hearing.

A word of caution, however, is in order. In United States v. Hooker, 48 IBLA 22 (1980), we held that where a mineral examiner utilizes an erroneous standard in determining whether a discovery has been shown to exist, his expert opinion that there has been no discovery is insufficient, of itself, to establish a prima facie case. But we noted that "while the mineral examiner's ultimate conclusion of invalidity may have been rendered fatally defective because of the application of improper standards, this in no way tainted the other testimonial evidence which he gave." Id. at 31. In the instant case, while obviously no value could be placed in Nelson's earlier expressed opinion as to the claims' invalidity, we do not believe the assay report to be totally worthless.

While the atomic absorption method is not as universally accepted in the mining industry as is the standard fire assay, it is, nevertheless, a

recognized test of gold content. 6/ In point of fact, a number of the assays showed appreciable amounts of gold. Thus, sample Little Gem #1 showed 1.04 ounces per ton gold and 0.25 ounce per ton silver. See Exh. T. While Nelson had conceded that these assays showed high quality he contended that there was insufficient quantity of such material to warrant the development of a mine (Tr. 116). We will examine the question of the quantity of minerals exposed, infra. But, it is our view that, despite the failure of the Government to establish a prima facie case, it is not necessary to totally ignore the values disclosed in the assays which were performed. This point becomes relevant since, as Judge Mesch noted, appellants failed to move to dismiss the contest but rather proceeded to present their case. And, it is here that their problems arose.

[1] As has been well established, when the Government contests the validity of a mining claim on the basis of lack of discovery, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which preponderates sufficiently to overcome the Government's case on those issues raised. United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Rice, 73 IBLA 128 (1983).

If the Government fails to present sufficient evidence to establish a prima facie case, the claimant not need present any evidence in order to prevail. But, should the claimant proceed to present evidence, the evidence which he tenders must be considered and the deficiencies in the Government's presentation may, in effect, be remedied where the contestees' evidence supports the allegations made in the contest complaint. United States v. Rice, supra; United States v. Beckley, 66 IBLA 357 (1982); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). We wish to make it clear, however, that the mere fact that the contestee elects to proceed with the presentation of his case does not mean that he therefore must preponderate on the issues raised in the contest. The requirement of preponderation only arises as to issues for which the Government has presented a prima facie case. Where there is no prima facie case, there can be no issue on which a claimant must preponderate. The only risk that the claimant runs is the risk that the evidence as a whole will prove that an element of discovery is not present. Inasmuch as contestees chose to present evidence, Judge Mesch proceeded to consider contestees' testimony.

After setting forth relevant parts of the testimony of Emanuel and his expert witness, John O. Rud, Judge Mesch stated:

> The contestees did not present any evidence from which any conclusions might be drawn as to (1) the amount of mineralization within any one of the contested claims that might be available for extraction, or (2) the value of the mineralization that might be extracted. Without some information relating to each of the factors, no one could conclude that a mineral deposit has, in

6/ Indeed, it is generally accepted that fire assaying should not be used to sample placer gold. See Wells, Placer Examination: Principles and Practice at 91.

> fact, been found within any one of the contested claims of sufficient quantity and quality to justify the development of a mine. Accordingly, I cannot find from the contestees' evidence that any one of the claims was timely perfected and is presently supported by the discovery of a valuable mineral deposit.

The problem we have with this analysis is that it presupposes an affirmative obligation on the contestees to establish the existence of various elements necessary to sustain a finding of discovery where the Government has failed to establish a prima facie case on any one of them. No such obligation existed except for the Barbara and Hillside claims for which the Government did establish a prima facie case, and even for those claims, contestees were only required to preponderate over the Government's showing. See United States v. Hooker, supra; United States v. Taylor, supra. The decision imposed a burden of proof where no such burden existed.

While the application of an erroneous test might normally result in the reversal of a decision on appeal, our independent review of the evidence and testimony adduced, particularly that supplied by Rud, convinces us that all of the mining claims involved, with the exception of the Waterhole Nos. 1 and 2, and the Little Gem claims, were properly declared null and void. We shall set out in some detail the testimony that impels us to this conclusion.

First of all, we would point out that none of the evidence presented by contestees contradicted their earlier statements that the Hillside and Barbara claims were invalid. Indeed, their only concern with these two claims was the fear that the workings which they had assumed were on the Waterhole No. 1 and Waterhole No. 2 claims might actually be on the Hillside and Barbara claims if the Government's placement of the claims was correct. 7/ Since, however, we agree with Judge Mesch's determination that Emanuel's recollection should control the situs of the claims, all of the workings do, in fact, fall within the Waterhole Nos. 1 and 2 claims.
Therefore, the decision of Judge Mesch as to the Hillside and Barbara claims is affirmed.

Emanuel testified at some length concerning matters surrounding the original location of the claims. According to Emanuel, the claims were originally located in the 1940's by Will Pool (Tr. 139). Emanuel became involved about 1950 when he commenced working on the vein which traversed the Waterhole Nos. 1 and 2 claims (Tr. 142). He noted that just before the Air Force moved in they had sunk a shaft approximately 30 to 40 feet on the Waterhole No. 2 claim and discovered a vein of nearly pure tungsten (Tr. 145-46). Emanuel testified that while they had removed and stockpiled a good

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7/ Thus, Emanuel noted that:

"Well, now that we find that what we thought was Waterhole No. 2 shows to be on the Hillside claim, I had a first doubt that the Hillside didn't have anything on it, but according to their map and the information we have now, the Hillside claim is our main claim. So the Waterhole claim is also a main claim, and Mr. Pool told me when I went out there with the engineers, that the Barbara claim had a very nice showing of gold on it, but I never could find it. But he claimed that there was a nice showing of gold on there." (Tr. 169-70).

amount of tungsten, they had been forced to abandon it when the Air Force commenced using the land and subsequently acquired the lease, and he asserted that the Air Force had apparently allowed various trespassers to remove the stockpiled ore as none was now present (Tr. 159, 185-86). No samples were taken for tungsten as the shaft had caved by the time the mineral examiners visited the claim (Tr. 147).

It is evident that the main focus of activities was on the two Waterhole claims, as is made clear in the following exchange relating to the possibility that the main workings were, as the Government contended, within the Hillside claim:

> Q. [By Shadle] Is that one of the reasons that you blanketed the area with claims, so that you'd be sure and have your location within one of the claims?
>
> JUDGE MESCH: Workings.
>
> Q. Workings within one of the claims?
>
> A. We knew the whole area to be mineralized, and all this property that you see on this BLM-E map was open for location. And we did it to protect ourselves, which is of course a general practice in a mining area, to locate a lot of claims to protect your main discovery claim, and also because we did think that the other claims had merit. And we wanted to locate them and get them secured before somebody else did it, because they were open to location at that time.

(Tr. 155).

When asked what where the values on the various claims Emanuel testified that in addition to the Waterhole claims, which he referred to as "main claims"

> [t]he Beehive claim has got good values on it; the Red Rock claim has got good values on it. The Little Gem has got good values on it. The Red Top might be questionable; I'm not going to say because it seems as though there's a controversy over where the location of that shaft is, whether it's on the Red Top or whether it isn't. The White Rock, I think when you receive the testimony from our geologist, you'll find that the White Rock has tremendous potential, and also the Arizona. And the Red Top.
>
> Anyway, I would say, looking over the whole deal, that as a mining property the entire thing should be retained as a unit, yes.

(Tr. 170).

Subsequently, Emanuel stated that he had located the Red Top claim because of the existence of a "very nice-appearing shaft with nice-looking quartz on it, and also it was in an area that we wanted to take control of" (Tr. 181). When the Government's counsel examined the witness as to the area of the strongest showing, Emanuel replied:

> A. Well, we're going to refer to it as Waterhole 2, because I still think that's where it is. Yes, that has been our strongest showing, and however, there is a very strong, heavy vein on Waterhole 1 that I would like very much to follow up someday. And there are other claims that have a tremendous potential due to the geological structure of the area, and I think you'll get further information on that from my geologist.

(Tr. 184-85).

Appellant's geologist, John O. Rud, who specialized in small mines, testified that he visited the claims at the contestees' request and took a number of samples. Because of the importance of his testimony we will set it out in some detail. Rud testified that he spent 2 days on the claims and took eight samples from the Waterhole Nos. 1 and 2 claims (Tr. 195). Rud stated that he took his samples to show the continuity of the mineralization within the structure (Tr. 197). Four of the samples showed no gold, one showed a trace, and the highest of the remaining three was 0.096 ounce per ton substantially less than a number of the Government samples. Compare Exh. T with Exh. 27. It should be noted, that all of Rud's samples showed higher silver values than any of the Government samples, with one sample assayed at 2 ounces per ton.

More critical, however, were some of the conclusions which Rud drew from his examination of the claims, particularly related to the question of whether there was sufficient tonnage to warrant development:

> Q. [By Shadle] At today's price of gold, first of all, and then we'll relate it back to 1962, but what about at today's price of gold with the assays that you found, what are your conclusions and recommendations concerning the mineral deposits on the Emanuel-Pool claims?
>
> A. Well, if you're -- if you had such an excellent producer -- it is a good gold producer with this much interest in gold today, and so forth, and any claims surrounding that Fortuna district would be of value to -- if you could get in there and do some work. Mainly exploration work, structural, stratigraphic, work to find this faulted segment. It would -- it would just -- it's just an excellent target. [Emphasis added.]

(Tr. 205-06).

> Q. [By Goreham] So based on your -- as you stated in your report, Exhibit 26, based on your examination on the ground and also your readings of the La Fortuna -- the history of the La Fortuna, you'd recommend exploration work?
>
> A. Yes, I would. I wouldn't -- like I say, I would recommend stratigraphic structural studies and then put the drills out there. And drilling the anomalous zones as you -- putting that structure back together to find that lost segment. Now where it is, everybody's got their own opinion, it's to the

> southwest. That covers a lot of ground, of course, but it's got to be there. [Emphasis added.]

(Tr. 212-13)

It is clear from the record that Rud thought the contestees' claims had value as an area to search for the old Fortuna segment. As was noted above, the La Fortuna mine had closed in 1904 when they lost the vein they had been mining at the Queen fault. What Rud was hypothesizing was that contestees might be able to find the continuation of the Fortuna vein on their claims. That is the basis of his expert opinion as to the claims' validity. Indeed, his testimony merely reiterated the conclusions of his written report. Thus, he had noted:

> At today's prices of gold the faulted segment of the Fortuna vein represents a excellent and viable exploration target. The exploration would be guided by thorough stratigraphic and structural studies that would include the Emanuel mineral claims.
>
> Primary targets are located on the White Rock and Arizona mineral claims since they lie in the area of the known strike of the Fortuna vein. The faulted segment of the vein has been searched for by past prospectors but no modern day attempt has been made utilizing geochemical and geophysical techniques presently available.

(Exh. 26 at 3-4).

The entire thrust of Rud's testimony leads to the inescapable conclusion that, however good a prospect these claims may be, they are still, nevertheless, only a prospect. As Judge Mesch noted, evidence which merely shows that the claims might warrant further exploration does not establish the existence of a discovery of a valuable mineral deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969).

We noted above that, in the absence of a prima facie case, no burden devolves upon a claimant to affirmatively show the existence of a discovery. In the instant case, however, contestees' testimony, particularly that of Rud, would, we believe, justify the conclusion that no discovery existed on any of the claims. The values disclosed by Rud on the Waterhole Nos. 1 and 2 claims were minimal and his sampling to show the continuity of the vein structure actually supported the Government's assertion that the high values disclosed on the Waterhole Nos. 1 and 2 claims were isolated showings. Indeed, Rud actually discounted the highest Government assay noting that "there's no way you're going to hold tonnage at an ounce and a half, you know" (Tr. 208). But, the proper test requires advertence to the entire record and when the Government assays are considered in conjunction with the testimony of Emanuel we feel that the contest should be dismissed with reference to three claims: the Waterhole No. 1, the Waterhole No. 2, and the Little Gem.

First of all, the Government assays of these claims were sufficiently high to support a finding of a discovery if sufficient quantity could be shown to exist. While the Government mineral examiners expressed the view

that quantity was lacking, the subsequent confusion over the taking of the assays deprived this opinion evidence of much of its force. Emanuel, on the other hand, was quite certain in his own mind as to the value of the two Waterhole claims. We wish to make particular advertence to the issue of the discovery of tungsten in the caved shaft.

Normally, a claimant is expected to keep his workings available for inspection. Thus, if a claimant contends that the values can be found at depth, but the shaft is either caved or cannot safely be entered, the mineral examiner has no obligation to either imperil himself or retimber the shaft. See generally United States v. Hess, 46 IBLA 1, 5 n.1 (1980). However, that rule presupposes that the claimants had access to the claims and could be held responsible for any deterioration which occurred. In the instant case, in contradistinction, the Government held a lease on the land. Thus, it was the Government's obligation not to destroy evidence necessary for the claimant to show his entitlement to a patent. It seems clear that the destruction of the shaft occurred after the Government took possession. This being the case, it was the Government's obligation to restore the caved shaft to its prior condition so that an adequate examination could be made. Failing in that, the Government will not be heard to contest an assertion of a claimant that a discovery existed at depth. Thus, for this reason alone we would reverse the decision of invalidity as it related to the Waterhole No. 2 claim. 8/

Considering all of the relevant and probative evidence of record, we conclude that the evidence clearly establishes that there was no discovery on the Hillside, Barbara, Beehive, Red Rock, Red Top, White Rock, and Arizona lode mining claims. Accordingly, Judge Mesch's determination that these claims were invalid must be affirmed. Insofar as the Waterhole No. 1, Waterhole No. 2, and the Little Gem lode mining claims are concerned, the evidence does not establish that they are invalid, and since the Government failed to establish a prima facie case of invalidity, the contest is properly dismissed as to these three claims. In addition, since it is impossible to find that all of the mining claims are invalid, it follows that the contest must be dismissed as to the Pool millsite claim, as well.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed as to the Waterhole No. 1, the Waterhole No. 2, and the

8/ This case is clearly distinguishable from our recent decision in United States v. Rosenberger, 71 IBLA 195 (1983). As the Board found in that case, the testimony established that claimants had been searching for a deposit of copper thought to exist below the shaft, and there was nothing in the record to indicate that an actual ore body had ever been exposed. Id. at 201. Here, with reference to the discovery of tungsten, claimants directly asserted that a discovery had been made prior to the Governmental actions in obtaining possession of the land. Thus, their inability to prove that a prior discovery existed would be causally linked to the Government's failure to maintain the shaft in the condition which existed upon the Government's taking possession. In Rosenberger, since the evidence failed to support any claim of a prior existing discovery, no such linkage existed.

Little Gem lode mining claims, reversed as to the Pool millsite claim, but affirmed as to all the other claims for the reasons stated herein.

_____
James L. Burski
Administrative Judge

I concur:

_____
C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING WITH RESULTS IN PART AND DISSENTING IN PART:

I have no quarrel with the majority dismissing the contest against the Waterhole No. 1, Waterhole No. 2, and Little Gem lode mining claims and the Pool millsite claim. For the most part, I find no fault with their statement of the law or the conclusions based upon their application of the law cited. I do have a serious problem with their acceptance of an underlying premise which is the foundation for their finding that the remaining claims are invalid.

In order to understand the basis of this premise, one must look at the circumstances surrounding the typical mining claim contest case. In the "normal" case, the claimant has free access to his property, has the ability to develop this property and, therefore, should be more familiar with this property than the contesting Federal agency. This being the case, the Government is required only to come forward with a prima facie case that the claim is invalid because it lacks one or more of the elements critical to the existence of a valid claim, usually an element of discovery. If sufficient evidence is presented to raise a reasonable question regarding the validity of the claim, the contestant has established the "prima facie" case. The claimant then must come forward and demonstrate that the conclusion drawn by the witnesses for the contestant was either wrong or was not supported by sufficient evidence. To hold otherwise would place the contestant in a position of having to prove something when the proof is more logically in the hands of another. The claimant should have the knowledge, experience, and familiarity with the property to be able to come forth with the proof, if the proof is available. This method of presenting and trying a mining claim contest is, in the normal case, the best balance between the respective interests and expertise of the opposing parties.

While Congress and the courts do not require that a claimant possess an expertise or intelligence greater than an ordinary prudent man, the proof of existence of a discovery is a complex matter hinging on the presentation of detailed physical facts. The shift of the burden of proof is justified because the claimant, in the normal case, has the most direct knowledge of these facts through experience gained when exploring for the valuable minerals and finding the discovery. The claimant, in the normal case, knows or should know the location of this discovery, its extent, and the quality of the mineral discovered and has or is in the best position to obtain the documentary and physical evidence necessary to demonstrate these facts. The underlying basis for the burden of the claimant is the comparative availability of material evidence to the respective parties. There is little doubt that, in the normal case, the material evidence is more readily available to the claimant. 1/

1/ This is the second case involving the same appellants that this author has considered. In Eva M. Pool, 74 IBLA 37 (1983), I found that certain claims owned by appellants were invalid. In that case, the contestant conceded that there was sufficient material of sufficient quality to be mined but presented evidence that the market for the mica of a grade found was such that the mineral could not be sold at a profit under present market conditions. With respect to the availability of evidence regarding the existence

The basis for the Government's challenge is usually the claimant's failure to have made a discovery within the confines of the claim. The claimant who fails is, in the normal case, the claimant who cannot show the existence of valuable mineral in such quantity and of such quality to warrant the development of a mine. This failure can come about by the lack of evidence, or by a poorly presented case or by the admissions of the claimant that he or she has not yet found sufficient mineralization to warrant the development of a mine.

The determination that the property is not sufficiently mineralized to warrant the development of a mine often comes about when the claimant admits that further exploration is needed prior to development. If a claimant, in the normal case, draws this conclusion, the judge hearing the case should be able to rely on the claimant's judgment. He or she is the party who best knows the property.

Not every case that reaches this Board is a normal case. Special care should be taken to determine if there is something about the case which differs from the norm. If there is an unusual circumstance, the circumstance should be analyzed to identify the party who has caused this set of circumstances to arise and the effect of this action on the ability of the other party to present its case. For example, if a claimant fails or refuses to keep the discovery points open for inspection by the mineral examiner, the claimant cannot challenge the contestant's case on the basis that the mineral examiner did not open those discovery points and sample at the inaccessible faces. The property is under the control of the claimant and if he desires to have samples taken at a specific place, that place should be made available to the mineral examiner. See United States v. Cook, 71 IBLA 268 (1983); United States v. Anderson, 57 IBLA 256 (1981); United States v. Polashek, 57 IBLA 104 (1981). If a party to a contest causes there to be circumstances that hamper or preclude the other party from presenting evidence in support of the case, the lack of evidence should not be used against the party so hampered or precluded. See United States v. Foresyth, 15 IBLA 43 (1974).

Many of the facts in this case have been cited in the majority opinion. In order to emphasize the factors which I believe differentiate this case from the "normal" case, certain of these facts should be restated.

The individual who was the "moving" party with respect to the location and subsequent work on the claims which are subject of this appeal was William A. Pool. Pool was a Spanish American War veteran who settled in southern Arizona. He worked in the Fortuna mine during the period of time that it was in operation and became familiar with the Fortuna ore and mining

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of a market for mica the appellants stood on an equal footing with the contestant. In that case, appellants failed to present sufficient evidence that there was a market for the product. The only evidence presented was the unsupported evidence with respect to lower transportation costs. In this case, there is no question regarding the market for precious metals and the contestant presented no evidence with respect to the market for tungsten

conditions. The Fortuna mine, which is located on claims adjacent to appellant's, was one of the largest gold producers in Arizona, but was shut down after the main vein was found to be faulted off and could not be found beyond the fault. Following the closure of the Fortuna mine Pool began prospecting in the area immediately surrounding the patented Fortuna claims.

In about 1940 Pool built a cabin on the Pool millsite and lived at the property during all but the hottest months of the year. He continued to develop these claims until about 1947 when he determined that because of his age it would be best to sell the claims. About this time his son-in-law Emanuel approached Pool and suggested that he, Emanuel, finance the development of a mine. Subsequently, they began developing the Waterhole No. 1 and Waterhole No. 2 claims. As is typical in such operations, they soon needed additional financing and sought out Pool's son and a third party to aid in the development. About this time the "black light" was developed and, using a black light, tungsten ore was found on the claims. The parties began extracting tungsten ore as well as gold ore. The operation was conducted with as little expense as possible and the underground openings were driven on the veins whenever possible. Some gold ore was shipped to Wickenberg, Arizona. The operation continued until 1952. During this time certain of the claims under review were either located or relocated. While Emanuel aided in monumenting these claims, it is clear that Pool remained the guiding force in the operation and made the determination regarding the ground to be located and the position of the claims.

In 1952, the Air Force expanded the Luke gunnery and bombing range to include the lands occupied by the mining claims and millsite. Pool and appellant Emanuel first learned of this action when the area occupied by them was used for gunnery practice while they were still on the claims. Pool and Emanuel contacted the Air Force and were referred to the Army Corp of Engineers. The Army Corps of Engineers then entered into negotiations for the lease of the property. In conjunction with the negotiations an examination and evaluation of the property was conducted by the Army Corps of Engineers. Emanuel aided the Corps representatives in their examination and evaluation. As a result the Army Corps of Engineers entered into a 5-year surface lease of the property in 1953. By this time the third party had withdrawn from the partnership and Emanuel and Pool's son relinquished their interest in the claims to Pool. The lease was therefore only between Pool and the Corps. At the time of the initial negotiations, Pool and Emanuel were advised that the lease would be exclusive and that they would not be allowed to go on or work the claims in any way during the term of the lease. They took the Corps at its word. Pool never returned to the property and Emanuel did not return to the property until 1978. In 1958 the lease was extended for an additional 5-year period. In 1962, the land was withdrawn from mineral entry by an act of Congress. In 1963, and at the end of each 5-year period until 1978 the lease was again extended. In 1969 or 1970 Pool died. In 1972, his son died. The appellants in this case, including Emanuel, are Pool's heirs.

In 1978, the Department of Defense determined that it would be in its best interest to acquire all outside interests in the area of the Luke bombing and gunnery range. In furtherance of this goal, condemnation actions were initiated against the property, naming the heirs of Pool as defendants. The lease was not renewed and no further lease payments were made. At the same time the Army Corps of Engineers made a formal request that a mining claim contest action be brought against appellants by BLM.

In preparation for this contest mineral examiners were sent to examine the claims. These examiners contacted Emanuel and asked him to accompany them during an examination of the claims. In 1978, Emanuel went to the claims with the examiners, thinking that the examination was in conjunction with the condemnation proceedings. When Emanuel arrived at the claims he was confused with respect to the location of the claims and had some difficulty orienting himself on the ground. This was understandable. The claim corners and other monuments had been destroyed during his 25-year absence. The cabin had been burned and other improvements obliterated. The mine openings were caved and were inaccessible.

The examiners asked Emanuel to identify the valuable minerals on the claims and it is apparent that Emanuel did his best to accommodate them. I believe that where he could not identify a location of previous activity, he chose what he though might be a likely spot. The discussion found in the majority opinion concerning the confusion as to the location of the claims on the ground well illustrates Emanuel's difficulties. Two years after the examination BLM filed a complaint and initiated the contest which is the subject of this appeal.

After the contest complaint was filed, Emanuel sought out and hired a geologist to aid in the defense of the case. This geologist was able to make a terse examination of the claims but was not able to open any of the caved underground openings in order to examine the underground showings, as the only time which the claimants or their representatives were allowed to go on the property was on the weekends and the Army Corps of Engineers advised them that no work to reopen underground openings would be allowed. In effect, the ability to do an in-depth investigation of the property was severely restricted by (1) the limitations placed on access by the military and (2) the economic restrictions placed on the activities by reason of the condemnation proceedings. Faced with a condemnation proceeding no reasonable man would expend time and money on these claims in hope of developing a paying mine, especially in light of the fact that any improvements placed on the property after the commencement of the condemnation action would not be considered when determining the condemnation award.

I find no basis for reliance on the statements of the expert witness regarding the necessity for further exploration. In light of the circumstances in this case, this line of testimony should be given the least weight possible, if any. The expert witness testified with respect to the property as he found it at the time of his inspection. He did not have the benefit of the experience, knowledge or expertise of the person who could have given him the background information reasonably necessary to make this determination. Pool, who had a familiarity with the property sufficient to draw a conclusion regarding the existence of a discovery was dead. If the case had been initiated in a timely manner in the early 1960's he would have been alive and could have aided in the defense of the claims and testified.

During the term of the lease and the extensions thereof the Army Corps of Engineers had maintained exclusive control of the property for a period of more than 25 years. During this period of exclusive control the underground openings had either caved or become so dangerous that access was denied the appellants. Appellants could not rehabilitate the openings in order to facilitate their preparation of a defense, even if they had the means to do so.

As stated before, if a claimant who has control of the property denies access or fails to keep the discovery open for examination by a mineral examiner, there is a presumption that the evidence contained therein, if exposed, would support the mineral examiner's case. While I do not want to go so far as to say that the actions of the Army Corps of Engineers denying unrestricted access to the property and the underground openings in existence at the time that the property was leased were designed to hinder the presentation by the claimants, this conclusion could be drawn. In any event, I believe that the presumption that underground openings would contain evidence detrimental to the party that refuses or fails to maintain these openings should be applied. However, in this case, it should be applied in favor of the appellants and against the contestant. The normal circumstances are reversed.

In summary, I find that the record contains overwhelming evidence that the Army Corps of Engineers has (1) denied access to the property for a period of 25 years; (2) failed to maintain the openings on the leased property or the monumentation of the claims; (3) held the property for a period of at least 15 years beyond the time when there was no doubt that the property would never be returned; (4) framed their actions to acquire the property in such a manner that the ability to take the necessary steps to develop the proof necessary to demonstrate discovery was denied the appellants; and (5) delayed the prosecution of the contest and/or condemnation resulting in the destruction of the presumption based on relative availability of evidence presumed present in a "normal" mining claim contest. As a result of the unilateral action on the part of the Army Corps of Engineers, I find that the burden of establishing, by a preponderance of the evidence, that the claims are invalid should be placed on the contestant. The contestant has not carried the burden of proof that should be imposed in this case and, therefore, the claims should not be declared invalid.

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R. W. Mullen
Administrative Judge